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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Amendment of Section 73.658(g) of	)	MM Docket No. 00-108
The Commission's Rules –	)	
The Dual Network Rule	)	

REPLY COMMENTS OF THE WB TELEVISION NETWORK

THE WB TELEVISION NETWORK

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SUMMARY

The WB Television Network fully supports the FCC's efforts to promote certain operating efficiencies for emerging networks through elimination of the Dual Network Rule. But The WB also reiterates that elimination of just one outdated regulatory restriction is not sufficient to achieve the goals sought by the Notice of Proposed Rulemaking ("NPRM"). The Commission's failure to address other unnecessary regulatory restrictions will, contrary to both Congressional intent and the FCC's longstanding policy, limit the growth of The WB as an emerging broadcast television network. Moreover, it creates unfair competitive advantages for certain other networks in violation of due process principals that all similarly situated parties must be treated equally.

The WB is in a corporate family that includes Time Warner Cable, an operator of numerous franchised cable systems across the country. Even with elimination of the dual network rule, the Cable Cross-Ownership rule prevents The WB, unlike any of the other national broadcast networks, from holding even non-controlling attributable investment interests in affiliated local broadcast stations in many communities. These owned and operated stations provide an important economic lifeline for a national broadcast network by assuring program carriage and contributing to a network's success so that it may better serve the public interest, convenience and necessity. Thus, even with the elimination of the Dual Network Rule, The WB -- unlike its competitors -- would be unable to achieve all of the operating efficiencies and other benefits intended by the NPRM.

Thus, any effort at regulatory reform must go further. Unless the FCC expands the scope its efforts to reform ownership regulation, The WB will be unfairly disadvantaged in its ability to

grow and compete and, as a result, the Commission will be unable to maximize consumer benefit arising from the reforms contemplated by the NPRM. The WB does not stand alone in this view. Many other commenters agree: the Commission should "help unleash the dynamic forces that facilitate the important development of emerging networks." But the FCC's adherence to such "unnecessary and counterproductive" ownership restrictions will only hinder the very goals its seeks to foster: diversity, competition and the basic structure supporting free, over-the-air broadcasting.

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REPLY COMMENTS OF THE WB TELEVISION NETWORK

The WB Television Network ("The WB"), by its attorneys, hereby submits the following reply comments in response to the above-captioned Notice of Proposed Rule Making ("Dual Network NPRM").[1] As it did in its comments in the above-captioned proceeding, The WB fully supports the FCC's efforts to promote certain operating efficiencies for emerging networks through elimination of the Dual Network Rule. But The WB also reiterates its view that elimination of just one outdated regulatory restriction is not sufficient to achieve the goals sought by the NPRM. The Commission's failure to address other unnecessary regulatory restrictions will, contrary to both Congressional intent and the FCC's longstanding policy, limit the growth of

[1] In the Matter of Amendment of Section 73.658(g) of The Commission's Rules – The Dual Network Rule, Notice of Proposed Rule Making, FCC 00-213 (2000) ("Dual Network NPRM").

The WB as an emerging broadcast television network. Moreover, it creates unfair competitive advantages for certain other networks in violation of due process principals that all similarly situated parties must be treated equally. Any effort at regulatory reform must go further. The WB's growth and competitiveness, as well as its ability to maximize consumer benefits, is hindered not only by the current Dual Network Rule, but also the current television station/cable system cross-ownership rule ("Cable Cross-Ownership Rule").[2] Indeed, many commenters agree: the Commission should "help unleash the dynamic forces that facilitate the important development of emerging networks."[3] But the FCC's adherence to some of its "unnecessary and counterproductive"[4] ownership restrictions will only hinder the very goals its seeks to foster: diversity, competition and the basic structure supporting free, over-the-air broadcasting.

As noted in prior comments, The WB Network is structured as a limited partnership. Its general managing partner is WB Communications, which is a division of Time Warner Entertainment Company, L.P. ("TWE").[5] A separate and *independently managed and operated* division of TWE, Time Warner Cable, operates numerous franchised cable systems across the country. The Cable Cross-Ownership rule prevents The WB, unlike any of the other national broadcast networks, from holding even non-controlling attributable investment interests in

[2] 47 C.F.R. § 76.501(a).

[3] Comments of Paxson Communications Corporation, filed Sept. 1, 2000 ("Paxson Comments") at 5.

[4] Comments of Fox Television Stations, Inc., filed Sept. 1, 2000 ("Fox Comments") at 1.

[5] The WB was launched on January 11, 1995, with two hours of prime time programming per week, carried by 48 affiliated stations nationwide. The WB is currently broadcasting thirteen hours of prime time programming on six nights, and carried by over 65 affiliated but independently owned local broadcast stations.

affiliated local broadcast stations in many communities.[6] Such owned and operated ("O&O") stations provide an important economic lifeline for a national broadcast network by assuring program carriage and contributing to a network's success so that it may better serve the public interest, convenience and necessity. Thus, even with the elimination of the Dual Network Rule, The WB -- unlike its competitors -- would be unable to achieve all of the operating efficiencies and other benefits intended by the NPRM.

Accordingly, The WB continues to call upon the Commission to modify not only the Dual Network Rule but also the Cable Cross-Ownership restriction in a comprehensive effort to address conditions at the outset of the 21st Century. In so doing, the Commission would maximize the public benefits sought by issuing the Dual Network NPRM and, at the same time, both level the playing field among competitors and adhere more closely to both statutory intent and Constitutional mandates.

I. Introduction

The WB filed timely comments in this proceeding on September 1, 2000. Therein, The WB demonstrated that while the Commission's proposed modification of the Dual Network Rule was a positive step to promote certain operating efficiencies for emerging networks, reform of the Dual Network Rule is not sufficient, in and of itself, to achieve the goals sought by the NPRM. The Commission's failure to address other unnecessary regulatory restrictions will, contrary to

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[6]Although an entity with a noncontrolling interest in The WB also owns television stations affiliated with The WB, The WB itself does not own or control any broadcast stations. In addition, SuperStation, Inc., an indirect subsidiary of Time Warner Inc., which indirectly controls TWE, is the licensee of WTBS(TV), Atlanta, Georgia. WTBS is not an affiliate of The WB and is operated independently of the network.

both Congressional intent and the FCC's longstanding policy, limit the growth of The WB as an emerging broadcast television network. Moreover, it creates unfair competitive advantages for certain other networks in violation of due process principals that all similarly situated parties must be treated equally. Any effort at regulatory reform must go further. The WB's growth and competitiveness, as well as its ability to maximize consumer benefits, is hindered not only by the current Dual Network Rule, but also the current television station/cable system cross-ownership rule ("Cable Cross-Ownership Rule").[7]

Indeed, The WB is not alone in this belief. A number of comments filed by various entities note that without comprehensive reform of ownership restrictions, the FCC will not adequately reach its goals of promoting competition, fostering diversity and supporting the viability of free over-the-air television. See, e.g., Comments of Fox Television Stations, Inc., filed Sept. 1, 2000 ("Fox Comments"), Comments of Paxson Communications Corporation, filed Sept. 1, 2000 ("Paxson Comments"), Comments of Viacom, Inc., filed Sept. 1, 2000 ("Viacom Comments").

In particular, the recent Fox and Paxson Comments make a compelling showing as to the pressing need for the Commission to reach beyond the Dual Network Rule and extend its efforts at regulatory reform to such other ownership restrictions as the Cable Cross-Ownership Rule. As Fox noted: "the proliferation of competitive distribution alternatives and the existence of strong market efficiencies . . . justify the elimination or substantial modification of all of the Commission's restrictions on broadcast television ownership."[8] Paxson's analysis demonstrated that "[r]elaxing or eliminating other ownership rules could help unleash the dynamic forces that

[7] 47 C.F.R. § 76.501(a).

[8] Fox Comments at 9.

facilitate the important development of viable emerging networks."[9] Therefore, the Commission "should consider again relaxing its other ownership rules."[10] The WB agrees fully with its competitors in this regard: the FCC should not continue antiquated regulation in the face of dynamic, dramatic developments that are, moment-by-moment, creating real time changes in the media landscape. The situation calls for rapid changes to the regulatory framework -- rather than the piecemeal approach that the Commission proposes.

II. Diversity

Viacom correctly notes that, time and time again, the Commission itself has found "the opportunity for diversity of programming content increases as the concentration of ownership of media outlets increases."[11] The reasoning is simply that single-outlet competitors seek the largest single audience possible. This militates for the undifferentiated mass market approach that marked network television of yesteryear. By contrast, common ownership of multiple delivery mechanisms creates incentives to serve audiences who prefer alternatives to the mass market middleground. In order to increase audience share, owners of multiple outlets must attract those who might otherwise ignore or limit their viewing of programs designed for the broadest common denominator mass audience. By serving the needs and interests of these niche audiences on its

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[9] Paxson Comments at 5.

[10] Id. at 9.

[11] Comments of Viacom, Inc., filed Sept. 1, 2000 ("Viacom Comments") at 34.

secondary outlets, it becomes possible for media companies with concentrated holdings "to garner the largest possible aggregate audience for their owner[s]."[12]

Viacom further notes that the ability of any one outlet to produce better quality -- or in some cases, any -- news or public affairs programming similarly increases through concentration. As the basic administrative and news gathering expenses are amortized over more outlets, the costs for such raw materials as obtaining and archiving event and interview videotape declines on a per-production unit basis within a larger media company. These raw materials are then transformed by producers into programming; the same material can function as the building blocks for variegated offerings on each outlet reflecting the different viewpoints of both the producers and audiences in both the mass market and niche settings – what Viacom aptly calls "production of 'customized' broadcasts" for smaller outlets.[13] This produces a net gain in viewership as a common owner seeks to increase its total audience across both primary and secondary outlets through deft packaging of otherwise editorially neutral raw materials into produced programming that reflects the diversity of its various audiences.

The business structure itself helps ensure such diversity: to reflect the tastes and viewpoints of the niche audiences they seek for advertisers, media companies cannot remain successful if they ignore audience tastes and viewpoints by pursuing editorial orthodoxy among all commonly owned outlets. As Viacom notes from its firsthand experience in radio, the FCC found "that in 45 percent of the instances in which CBS owned a radio and television station in the same

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[12] Id. at 32.

[13] Id. at 35.

market, the stations endorsed opposing candidates in political races."[14] These diverse decisions, driven by the audience in television and radio, would be no less were cross-ownership allowed for cable systems and television stations serving the same community. Given that it has now been firmly established that cable systems "speakers" under the First Amendment[15] able to guide the development of locally produced material on channels the cable system owners reserve for themselves, they are no different than broadcast station owners. If it is in the public interest to foster diversity by consolidation of ownership in broadcasting, then it would also serve the public's interest in diversity to allow common ownership of cable systems and broadcast stations in the same communities – because for the public, a channel is a channel, whether it gets on their cable system via a satellite, a land line or an over-the-air VHF signal.

As the Fox Comments point out, and the Commission has often acknowledged, TV networks are no longer discretely competing against each other. All providers of television programming, and not just the broadcast networks "are in the business of producing audiences."[16] As "the amount of television programming available is no longer constrained by the amount of spectrum available . . . any regulation failing to fully acknowledge that fact distorts the market and injures consumers."[17] Fox is correct when it notes that by simply focusing on the part of the broader video marketplace served by network television, the FCC is limiting the diversity available

[14] Id. at 41 (citing Broadcast Multiple Ownership Rules, 4 FCC Rcd at 1744.)

[15] *See* Turner Broadcasting v. FCC, 512 U.S. 622 (1994)

[16] Fox Comments at 6.

[17] Id.

to consumers who could similarly benefit from alliances between television networks and other entities – such as cable systems.

The same diversity produced by concentrated ownership in one medium would create a blossoming of diversity across media – if the Commission would only allow it. As the Paxson Comments note, "[t]his opportunity for increasing station value would create incentives for the emergence of new networks"[18] and the diversity they bring, as they "*have* to represent something new to create audience share and scale."[19] (emphasis in original). Just as common ownership of stations within the same community fosters diversity, so too will common ownership of once discreet vehicles for the delivery of video programming increase diversity – whether the cross-owned properties are on cable and satellite, broadcast or distributed via the Internet. The same logic that militates, on the basis of diversity, for modification of the Dual Network rule, also militates for similar modification of the equally antiquated Cable Cross-Ownership Rule.

III. Competition

Broadcasters are no longer in a competitive battle only among themselves. As Fox notes in its comments: "Today, 81 percent of the nation's home receive their television programming from a cable operator, direct broadcast satellite (DBS) provider, or other multichannel video programming distributor (MVPD) . . . More than 170 national and 50 regional cable networks supply programming to MVPDs. Fifteen cable networks reach at least 70 million American households. In the near future, video streaming over the Internet and digital broadcast television

[18] Paxson Comments at 6.

[19] Id. at 8-9.

will further expand the television choices available to millions of American households."[20] While "broadcast network advertising revenues increased by only 1.6 percent . . . cable network advertising revenues climbed 25 percent in 1999, while Internet advertising enjoyed an 85 percent increase."[21] As Viacom notes, "broadcast television networks clearly lack any semblance of marketplace 'dominance.'"[22]

Despite the foregoing developments, the FCC is not leveling the playing field among all the competitors in this vigorously competitive environment. Thus, The WB, whose corporate parent owns cable systems, is simply prohibited from maintaining owned and operated stations in major DMAs – even though its competitors are free to do so. Such rules run contrary to the public interest. As Paxson notes, the elimination of such rules will create strong competitors, as it would help make "new broadcast networks capable of attaining the necessary scale for economic viability."[23] In a vast, converging video environment, the distinctions of old, for example, between cable and broadcast, do not matter to the vast majority of Americans who, with remote controls in hand, have hundreds of channels available to them. Broadcast television is but another choice as they click and scroll through the available offerings. Thus, as Fox comments, "there is simply no basis for retaining ownership restrictions."

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[20] Fox Comments at 3. Citing In the matter of Annual Assessment of Competition in the Markets for the Delivery of Video Programming, Sixth Annual Report, CS Docket 99-230, FCC 99-418 (released Jan. 14, 2000)).

[21] Id. at 8-9.

[22] Viacom Comments at 13.

[23] Paxson Comments at 6.

Indeed, retention of existing ownership rules in their current form will simply allow those outlets that operate free of these antiquated restrictions to grow and dominate, leaving regulation-laden competitors, like The WB, restricted in their ability to move nimbly in the rapidly evolving and fiercely competitive market for video programming. Favoring one group of competitors in this way will not help competition. As the Fox Comments point out, such policies will simply make some free over-the-air broadcasters into weaker competitors as they, through FCC-imposed business isolation, will have less "ability to continue to invest and provide high-quality programming."[24] Such developments are clearly not in the public interest.

IV. Rule Changes Will Help Prevent the Continuing Erosion of Free Over-the-Air Television

As broadcasters remain saddled with the competitive disadvantage of lingering ownership regulations, it will spur "a disproportionate shift to subscriber-based alternatives,"[25] as Fox deftly notes. Insofar as longstanding Commission policy seeks to foster the continued availability of quality, free over-the-air broadcasting, the FCC's insistence on maintaining these ownership restrictions can only be seen as counterproductive to its own policy goals; the diversion of resources to subscriber-based services will " further decrease the quantity, quality, and diversity of the programming that the networks are able to offer."[26] As content declines, so does audience – and free over-the-air television's slide in the marketplace will only deepen. This is an especially

[24] Fox Comments at 8.

[25] Fox Comments at 8.

[26] Id. at 9.

difficult position for emerging networks, which have been instrumental in expanding diversity and competition.

In its comments, The Minority Media and Telecommunications Council praised the efforts of emerging networks to provide niche programming for minority viewers, noting: "there are only two principal over-the-air outlets for it -- UPN and WB."[27] Any rule that hinders the viability of either of these networks clearly harms key goals in support of over-the-air broadcasting. Thus, the continuation of such ownership restrictions cannot be characterized, in any way, shape or form, as reflecting the public interest. "The Commission should not abandon its promotion of new entrants," Paxson correctly notes, "the time has come for its rules to account for the impact of new competition and audience erosion."[28] "The Commission's recognition that networks must be large to be economically viable combined with the entrenchment of new marketplace competition"[29] militates for a comprehensive approach to regulatory reform of ownership rules that includes the Cable Cross-Ownership Rule.

V. Other, More Targeted Rules Protect Against Potential Abuses

However, the Commission says it is not ready to ease all of its ownership rules because ""the television industry has just begun adapting to the recent relaxation of our local television ownership . . . Prudence dictates that we monitor and ascertain the impact of these changes on

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[27] Comments of Minority Media and Telecommunications Council, filed Sept. 1, 2000, at 3 (citing Screen Actors Guild, "African American Television Report," (Jun. 7, 2000)).

[28] Paxson Comments at 8.

[29] Id.

diversity and competition before relaxing the cable/TV cross-ownership rule."[30] But as Paxson notes, the Commission errs by using the blunt instrument of a broad rule to protect against a narrow class of potential abuses. Other, more targeted rules provide adequate protection.

Indeed, "local ownership restrictions remain in place to protect actual diversity and competition specific to a viewer."[31] At the very least, minor refashioning of these rules could begin the process that would free all – instead of just some – of the creative forces, such as The WB, that endeavor to serve the public with the best in information and entertainment. Thus, while the Commission considers the long-overdue elimination of the Cable Cross-Ownership Rule, parties should be allowed to elect to enter into a television station/cable system combination in lieu of taking advantage of the relaxed duopoly or one-to-a-market rules in that particular DMA.

For example, under the current regulatory scheme, an entity is eligible under the relaxed duopoly rule to own two television stations licensed in the same DMA under certain circumstances.[32] An entity is also eligible to own up to two commercial television stations (if eligible under the relaxed duopoly rule) and six commercial radio stations in the same DMA under the relaxed one-to-a-market rule if at least twenty independently owned media voices would remain in the DMA post-merger.[33] However, an entity eligible to own two commercial television stations and six commercial radio stations can elect instead to own just one commercial television

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[30] Biennial Review Report, FCC 00-191, (June 20, 2000) ¶ 109.

[31] Paxson Comments at 8.

[32] 47 C.F.R. § 73.3555(b).

[33] 47 C.F.R. § 73.3555(c)(2)(i)(A).

station and seven commercial radio stations in the same DMA, effectively substituting an extra radio station for the extra television station.[34] In allowing for this substitution, the Commission first noted that "broadcast television is the single most important source of news for the majority of Americans" and determined as a result that in areas "where there is sufficient competition and diversity to justify combinations involving two *television* stations and six radio stations, broadcasters should have the flexibility to purchase an additional *radio* station instead of a second television station."[35]

The same rationale applies in allowing an entity to elect, for example, to offer cable service in the applicable DMA instead of owning another television station in taking advantage of the new duopoly or one-to-a-market rules. Thus, for example, an entity eligible to own two commercial television stations in the same DMA should have flexibility to elect instead to own one commercial television station and also own cable systems in the DMA in lieu of a second television station. This conclusion is buttressed by the fact that, in determining that at least twenty independently owned media voices would remain for purposes of the one-to-a-market rule, cable television counts as one voice in the DMA, regardless of the number of individual cable systems operating in that DMA.[36] If an entity can substitute one commercial radio station as its extra voice instead of an additional commercial television station for purposes of the one-to-a-market rule, then that entity should also be allowed to choose to substitute local cable systems as its extra voice in that DMA in lieu of an additional commercial television station. Such an interim

[34] 47 C.F.R. § 73.3555(c)(2)(i)(B).

[35] Television Broadcasting Order at ¶ 108.

[36] 47 C.F.R. § 73.3555(c)(3)(iv).

solution will avoid compounding the current competitive harm borne by The WB in complying with a cross-ownership rule that the Commission has already determined to be unnecessary.

VI. Conclusion

For the aforementioned reasons, Time Warner urges the Commission to broaden its regulatory reform efforts to include repeal of the Cable Cross-Ownership Rule.

Respectfully submitted,
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